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## TRIBUTE TO JUSTICE ESTHER TOMLJANOVICH

Douglas G. Hodder<sup>†</sup>

It seems we owe a debt of gratitude to Portia Moot. Ms. Moot was a lawyer. Before there were many, if any, women lawyers in Minnesota, Ms. Moot stationed herself in the courtroom doing battle for her clients. In the early 1940s, one could listen to the adventures of Portia Moot on a radio show of the same name. To our collective benefit, during some of her free time in grade school, Justice Esther Tomljanovich did just this. Today, Justice Tomljanovich explains that it was her desire to emulate Portia Moot that was at least partially responsible for her becoming a lawyer—and a justice on the Minnesota Supreme Court. Now, on the occasion of her retirement from the Minnesota Supreme Court it is easy to look back on her career as a lawyer and jurist to see a distinguished and selfless list of contributions and accomplishments.

Justice Tomljanovich was born in Iowa. Within a year she and her family moved to Buck Lake, Minnesota. Justice Tomljanovich spent most of her formative years in Minnesota's Iron Range where she got her early education in a one room, country school house north of Nashwauk. She graduated from Nashwauk High School and from there attended Itasca Junior College. Then, at nineteen years of age, she left her family to come to St. Paul, where she rented a room at the YWCA and attended the St. Paul College of Law, which later merged into William Mitchell College of Law.

Justice Tomljanovich was the only woman in her class at law school. Still, she was treated well by the professors and her classmates and was never frightened of the experience. She explains that she never realized she had anything to fear, a state of mind passed down to her from her father. After graduating, she had expected to return to Nashwauk to practice law. However, she remained in St. Paul and continued employment with Minnesota Mu-

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tual Insurance Co., where she had worked during law school.

Justice Tomljanovich left Minnesota Mutual to become Assistant Revisor of Statutes. She served in this position until 1966 when her son, William, was born, but she did not lose touch with the legal profession while staying at home to raise William. She drafted bills for a number of lobbyists and did part time work for West Publishing Company and Minnesota Continuing Legal Education from her home. However, a frog in her garage one day convinced her it was time to go back to work outside her home. When her husband arrived home from work that day and asked her how her day had gone, she realized that the most exciting thing that had happened to her was finding a frog in the garage. At that point, she realized she needed to return to work outside her home.

The first position she took, after her son William was born, was with the Minnesota County Attorney's Association. She joined the association to help write the first set of Minnesota Rules of Criminal Procedure. The job was more a drafting position, however, than a policy setting position. Still, she thought it was an interesting job where she had the opportunity to meet different people and become an expert in the Rules of Criminal Procedure.

While she was working with the County Attorney's Association, Justice Tomljanovich became aware that the Revisor of Statutes, then Joe Bright, was about to retire. She had been in the Revisor's office before, thought she would be good at the job, and liked its public relations and political aspects. So, with the idea of becoming acquainted with the legislators who would make the appointment for the upcoming opening, she left the County Attorney's Association to work in policy research for the Minnesota House of Representatives. Her efforts paid off; in 1974, Esther Tomljanovich became the first woman Revisor of Statutes in the state.

In 1977, after she served as Revisor of Statutes, then-Governor Rudy Perpich elevated Justice Tomljanovich to the bench in the Tenth Judicial District. She had never been in a courtroom. Still, with the guidance of other judges such as Jack Thoreen, and her unflagging efforts to always be prepared for court, Judge Tomljanovich won the respect and praise of the practitioners in the Tenth District.

Justice Tomljanovich served in the Tenth District for thirteen years. In 1990, then-Governor Perpich appointed her to the Minnesota Supreme Court, and she became the third woman appointed to that court. She served as Associate Justice on the su-

preme court for eight years until she retired in 1998.

During her career, Justice Tomljanovich championed for the improvement of the status of women in both the legal profession and society. Her commitment to this cause began a few months after graduating from law school. Justice Tomljanovich found herself invited to a law school honors dinner to be held at the Minneapolis Athletic Club. She was to attend with her future husband, William, who had graduated with honors from William Mitchell College of Law. On the evening of the event, she planned to meet William at the club and so arrived without him. Naturally, she entered the club through the front door. This caused quite a stir, and she was instantly asked what business she had at the club. When she explained that she was there to attend the honors dinner, she was told that women were generally not allowed in the club, and they were certainly not allowed without a male escort. It was then explained to her that she would have to wait in the coatroom until her male companion arrived.

Some time after this incident, while she was working in the Revisor of Statutes office, it became clear to Justice Tomljanovich that professional woman needed a forum where they could build a support structure for themselves. At least three other women, Justice Rosalie Wahl, Nancy Olkon and Judy Oakes, were of a like mind. From this idea sprung the Minnesota Women Lawyers, of which Justice Tomljanovich was one of the "founding mothers."

The charter's provisions aimed to raise the level of public consciousness of women in the legal profession and to secure appointments of women to the Minnesota Supreme Court. Members accomplished this through speech making, committee memberships and attendance at bar organization meetings. The organization has been wildly successful. Today, the Minnesota Women Lawyers is an organization having over 1200 members that is familiar to every lawyer, man or woman, practicing in the state. Moreover, since the inception of the Minnesota Women Lawyers, a number of women have been appointed to the state's supreme court. Indeed, one time the majority of the court was made up of women justices, and the court is currently headed for the first time by a woman, Chief Justice Kathleen Blatz.

Justice Tomljanovich was also instrumental in the establishment of the woman's correctional facility. During her tenure as a judge in the Tenth Judicial District, it became apparent to her that there were significant problems with the way women detainees in

her courtroom were handled. The Washington County correctional facility existing at that time could only house women by placing them in solitary confinement. In addition, there were no exercise or other types of programs for women inmates. Therefore, women coming through the Tenth Judicial District who were detained by the state were often sent to Cambridge, Minnesota, which had general facilities for women inmates. Cambridge, however, was quite a distance from where most of the women's homes were. Generally, the women had children, but there was no way for the children to visit their mothers. Even for the women to speak to their children by telephone was a long distance call, which typically was not something these women could afford.

During Justice Tomljanovich's time on the bench in Washington County, designs for a new correctional facility were being drafted. So she formed the Women's Offenders Committee with a number of female probation officers. The committee put together a proposal to include housing for women inmates as a part of the new correctional facility. The correctional facility today has housing facilities and exercise and other programs for women inmates.

Justice Tomljanovich's contributions to women's rights do not end here. In the early sixties, President Kennedy created a national committee on the status of women. Justice Tomljanovich and another woman, Edna Schwartz, the president of the state Professional Woman's Club, believed that Minnesota should also have its own Committee on the Status of Women. So, in 1962, these two women convinced then-Minnesota Governor Rolvaag to appoint such a committee.

The charter of the state committee was to investigate the status of women in various areas of society such as education, labor and employment, the legal field, child custody, and other societal institutions. One of the committee's goals was to pass an "equal pay for equal work" bill through the state legislature. At the time there was tremendous opposition to any such bill because it was generally viewed as a measure which would deal a nearly deadly blow to state business and commerce.

However, this bill was so important to Justice Tomljanovich that she set aside her reservations about testifying in front of the Minnesota Legislature while employed as an Assistant Revisor of Statutes, and argued for passage of the bill. Her efforts, and those of the Committee of the Status of Women were, of course, successful.

After the committee provided its final report in 1967, Justice Tomljanovich and others continued its work by forming the Council on the Status of Women. This organization was largely responsible for making women a protected class under the Minnesota State Human Rights Act. After the Council on the Status of Women, Justice Tomljanovich continued to push for legislation promoting women's rights under the auspices of the Business and Professional Woman's Club, a national organization.

During her tenure on the Minnesota Supreme Court, Justice Tomljanovich continued to work for women's rights, particularly in the area of women offenders. For a number of years, she sat on Governor Rudy Perpich's judicial selection committee where she advocated for the appointment of women judges to the Tenth Judicial District.

However, during her time on the supreme court, the rights of women were not her only concern. Justice Tomljanovich considered herself a sort of "non-partisan activist," and is the most proud of the opinions she wrote in which she convinced the court to adopt her, perhaps, less mainstream point of view. Examples of such decisions include *In re R.A.V.*,<sup>1</sup> *State v. Dickerson*,<sup>2</sup> and *State v. Carter*.<sup>3</sup> In *R.A.V.*, the City of St. Paul alleged that a minor, R.A.V., participated in burning a cross inside the fenced yard of an African American family's home. R.A.V. was charged with violating a St. Paul city ordinance which provided that burning a cross on public or private property with knowledge that it would arouse anger or normal resentment in another based on race, color, religion, or gender, constituted disorderly conduct and would be guilty of a misdemeanor. The trial court dismissed the charges, explaining that the ordinance censored expressive conduct in violation of the First Amendment of the United States Constitution. In a decision written by Justice Tomljanovich, the Minnesota Supreme Court, however, narrowly construed the ordinance not to infringe on First Amendment rights and reinstated the portion of the petition charging R.A.V. with violating the ordinance.

In *State v. Dickerson*, the question was whether a police officer executing a warrantless protective weapons search could seize an object from a detainees pocket based on the officer's perception

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1. 464 N.W.2d 507 (Minn. 1991), *rev'd sub nom.* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

2. 481 N.W.2d 840 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993).

3. 569 N.W.2d 169 (Minn. 1997), *rev'd*, 525 U.S. 83 (1998).

that although the object was not a weapon, it felt like contraband. In *Dickerson*, an officer was performing a *Terry*-type<sup>4</sup> stop and search when he felt a small lump in the defendant's front pocket. The officer "examined it with [his] fingers and slid it and felt it to be a lump of crack cocaine in cellophane."<sup>5</sup> The officer then reached into the defendant's jacket pocket and pulled out what would prove to be a 0.20 gram rock of crack cocaine in a knotted sandwich-wrap bag. The supreme court determined that when a police officer carrying out a *Terry*-style protective weapons search feels an object in a suspect's clothing that cannot possibly be a weapon, the officer is not privileged to pinch, squeeze, twist or otherwise manipulate the object to determine what it is. Acknowledging a dissent by three other justices which stated the "law enforcement is not a game in which liberty triumphs whenever a policeman is defeated," the majority opinion noted that "we are equally certain that liberty does triumph when the vitality of the Fourth Amendment is reaffirmed and an individual's basic right to be free from unreasonable searches and seizures is vindicated."<sup>6</sup>

In *State v. Carter*, the court reviewed the actions of a police officer who went behind some bushes, stood twelve to eighteen inches from an apartment window, and looked through cracks in a closed blind to view cocaine being bagged inside the apartment. The lower court had held that the officer's actions did not amount to a "search" under the Fourth Amendment because the defendant's activity was not viewed from a location where he had a reasonable expectation of privacy. In a decision written by Justice Tomljanovich, the Minnesota Supreme Court reversed the lower court, holding that it was a search for the police officer to step off the sidewalk, walk across the grass, climb behind some bushes, and look into a ground floor apartment by peering through a gap in the closed window blinds from a distance of twelve to eighteen inches. The court further held that because the officer had neither probable cause nor a warrant, the search was unreasonable.

Perhaps the fact that these decisions could be considered "activist" in nature is best evidenced by the U.S. Supreme Court's subsequent hearing of all three of these cases, and its reversal of two of them. For Justice Tomljanovich, it is likely that the U.S. Supreme Court's reversal of opinions written by her only adds to her sense of

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4. *Terry v. Ohio*, 392 U.S. 1 (1968).

5. *Dickerson*, 481 N.W.2d at 843.

6. *Id.* at 846.

pride in the decisions.

Perhaps most remarkable about Justice Tomljanovich is that, as anyone who knows her can tell you, she has accomplished all this and much more with inimitable style, an unwavering kindness and humanity, and a tremendous ability to have fun. Walking into her chambers on the top floor of the Minnesota Judicial Center one would instantly feel at ease and welcome; you were not dealing with just a state supreme court justice—you were talking with a warm, caring human being who made you feel like the most important thing she had to do that day was talk with you. Her presence on the supreme court will certainly be missed.



